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No. 611.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On the grounds set forth below, petitioner requests rehearing of this Court's order of February 18, 1963, denying certiorari.

1. *New Developments in State Court Case.* We previously informed this Court that the *Beezer* case—which would determine definitively whether, under the Washington state statute, petitioner's properties are electric properties which Seattle is forbidden to condemn—was set for trial in the state court on March 4,

1963 (see Petition, Appendixes C and D, and Petitioner's Reply, p. 2). Subsequent to this Court's denial of certiorari in the present case, however, Seattle filed in the state court a motion to dismiss the *Beezer* case, based solely on the ground that this Court's denial of certiorari here had made *Beezer* moot. Petitioner has filed in the state court a memorandum in opposition to Seattle's motion. Petitioner's memorandum takes the position that the District of Columbia Circuit's decision here and the denial of certiorari do not and cannot interfere with the rightful jurisdiction of the state courts to determine whether Seattle would be exceeding its powers if Seattle proceeded to condemn petitioner's properties despite the Washington statute's affirmative prohibition.

The state trial judge now has deferred consideration of Seattle's motion, and of petitioner's opposition thereto, until petitioner shall have filed and this Court shall have acted upon the present petition for rehearing.

These circumstances strongly emphasize the nature of the misunderstandings which, in the state court litigation, may be a consequence of the denial of certiorari. In effect, such litigation may well be prolonged because of the unresolved conflicting contentions and inferences as to the precise issues which the federal proceedings do and do not resolve.

2. *Conflict of Decisions between Ninth Circuit and District of Columbia Circuit.* These circumstances likewise emphasize the gravity of the conflict between the District of Columbia Circuit's opinion here and that of the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n*, 207 F. 2d 391.

(1953), certiorari denied, 347 U.S. 936, concerning a major constitutional issue heretofore undecided by this Court.

In the latter case the Ninth Circuit declared that the Federal Power Commission had no authority to "adjudicate" the effect of the limitations on the powers of a city, as a licensee of the Commission, to initiate necessary action under its charter. The Ninth Circuit held that the decision of the Federal Power Commission was final as to the issuance of the license but that the legal capacity to act under the license, once granted, would be subject to any applicable limitations of state law which the Commission has "no power to adjudicate."

The Ninth Circuit opinion reads in part (207 F. 2d at 396):

> "However, we do not touch the question as to the legal capacity of the City of Tacoma to *initiate and act* under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, *but the Commission has no power to adjudicate them.*" [Emphasis supplied] (citing *City of Tacoma* v. *Taxpayers*, No. 32411, 43 Wash. 2d, 468, 262 P. 2d 214, which was then pending before the Supreme Court of Washington)

By citing the above state court case the Ninth Circuit recognizes state limitations on the power of municipalities to be controlling.

Thus the Ninth Circuit opinion declared that the state law fixes and limits the powers of a city even

when the city is a licensee of the Federal Power Commission. Certiorari was denied.

In the present case, on the other hand, the District of Columbia Circuit has said that state law "cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute" (Petition, p. B-9). Here again, certiorari has been denied.

Hence it plainly appears that the Ninth Circuit unqualifiedly held that the capacity to act under a federal license is subject to the licensee's disabilities under state laws, whereas the District of Columbia Circuit asserts exactly the contrary.

3. *Conflict as to the Law to be Applied to this Project.* The confusing situation left wholly unresolved by the denial of certiorari would by no means be confined to the *Beezer* case pending in the state courts. In addition, when Seattle brings condemnation proceedings in a federal district court in the State of Washington to condemn petitioner's properties, the federal district court will be bound to follow and apply the law as it has been declared by the Ninth Circuit. Hence such condemnation proceedings will be controlled by the state statute which prohibits a city from condemning any part of the electric system of a public utility district. This makes it imperative that the state court, in the *Beezer* case now pending shall first decide whether or not the properties of petitioner are such properties as the Washington statute has forbidden Seattle to condemn.

The major issue of constitutional and statutory interpretation is whether Congress can empower—or ever intended to empower—a municipal corporation, which is merely a subordinate political subdivision of

a state, to do that which the parent state has expressly prohibited the municipality from doing. This issue has not heretofore been decided by this Court in this context, but the principle involved is one on which this Court has expressed itself in favor of petitioner's position, in *Dallemagne* v. *Moisan*, 197 U.S. 169, 174:

> "It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, *unless its execution is prohibited by the Constitution or legislation of the State.*" [emphasis added]

Resolution of the conflict between the Ninth Circuit and the District of Columbia Circuit is imperative to determine the proper allocation of functions between the Federal Government and the States. It likewise has great practical importance as a means for removing uncertainties that threaten to prolong the litigation relating to the competing efforts to build a new hydroelectric project on this stretch of the Pend Oreille river. Exceptionally compelling reasons thus exist for granting certiorari and resolving the conflict between the two circuits.

CONCLUSION

On the grounds here set forth—as well as those previously urged—rehearing should be granted, the order of February 18, 1963, denying certiorari should be vacated, and certiorari should be granted. Moreover, since the *Beezer* case is ready for trial in the state court, a definitive determination on the state law question can easily be available to this Court before the present case would be reached for argument in normal course if certiorari is granted now. Accord-

ingly, the granting of certiorari at this time will enable this Court to do what the Court of Appeals improvidently failed to do—namely, to have before it a definitive interpretation of the state law question on which the major constitutional issue turns.

Respectfully submitted,

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March 8, 1963

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

BENNETT BOSKEY